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Division II  
State of Washington  
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No. 51260-2-II

IN THE COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

RANDY CAPPS, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY  
THE HONORABLE GAROLD E. JOHNSON

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

- A. The Trial Court Abused Its Discretion When It Failed To Follow The Directives Of CrR 7.8(c) To Either Hold A Show Cause Hearing Or Transfer The Motion To The Court of Appeals.

### ISSUE RELATED TO ASSIGNMENT OF ERROR

- A. Did the trial court abuse its discretion in ruling on Mr. Capps's motion, when under CrR 7.8 it had to either hold a fact-finding hearing or transfer the motion to the Court of Appeals for consideration as a personal restraint petition?

## II. STATEMENT OF FACTS

Pierce County Prosecutors charged Randy Capps by second amended information with aggravated murder in the first degree. The crime occurred in 1994, when Mr. Capps was 20 years old. CP 3-4. Mr. Capps pleaded guilty on May 1, 1995. CP 10-14. The court sentenced him to a mandatory life sentence without the possibility of parole. CP 22.

On October 16, 2017, Mr. Capps filed a CrR 7.8 motion for relief of judgment. CP 21-31. Mr. Capps relied on *State v. O'Dell*, 183 Wn.2d 680, 695-96, 358 P3d 359 (2015) and *In re Pers.*

*Restraint of Light-Roth*, 200 Wn. App. 149, 401 P.3d 459 (2017) to motion the court for a hearing to consider his youthfulness and immaturity at the time of the crime; an option which was not available to the court at the time of the original sentencing in 1995. CP 28-29. Mr. Capps requested the relief of a resentencing without the aggravating factor, and imposition of a sentence for murder first-degree, under the statutory guidelines of 1995. CP 30.

Mr. Capps filed a notice of hearing on October 16, 2017 and filed a declaration of service on the prosecutor's office with the Pierce County clerk. CP 25,31.

On November 30, 2017, the trial court considered and denied the motion. CP 32-36. The court found the motion timely but held that Mr. Capps's motion for an exceptional downward sentence was based solely on the mitigating factual assertion he was only 20 years old at the time of the crime. CP 34. Relying on *State v. Robinson*, 153 Wn.2d 689, 696, 107 P.3d 90 (2005), the court found Mr. Capps had not established grounds for relief and denied the motion without a hearing. CP 34.

Mr. Capps makes this timely appeal. CP 37.

### III. ARGUMENT

#### A. The Trial Court Abused Its Discretion When It Failed To Follow The Directives Of CrR 7.8(c).

##### 1. Procedures for CrR 7.8

Under CrR 7.8(c), the superior court should have either held a show cause hearing on the motion or transferred it to the Court of Appeals for consideration as a personal restraint petition.

A trial court's ruling on a CrR 7.8 motion is reviewed for abuse of discretion. *State v. Zavala-Reynoso*, 127 Wn.App. 119, 122, 110 P.3d 827 (2005). The trial court's decision will be reversed if it is manifestly unreasonable or based on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

CrR 7.8 (b) authorizes a trial court to grant relief from judgment for enumerated reasons and includes "any other reason justifying relief from the operation of the judgment." CrR 7.8(b)(5). CrR 7.8(c) outlines the procedures governing the trial court's authority to act on the motion.

When CrR 7.8(c) was formalized in 1986, it allowed trial courts to deny a CrR 7.8 motion for relief from judgment without a

hearing if the alleged facts did not establish grounds for relief. See *State v. Smith*, 144 Wn.App. 860, 861, 184 P.3d 666 (2008). In 2007, the amended rule limited a trial court's authority to rule on post-conviction motions. The current rule provides the criteria for determining when a trial court must transfer a motion to the Court of Appeals, when authorized to retain a motion, and the mandatory procedures the trial court must follow:

- (1) Motion: Application shall be made by motion stating the grounds upon which relief is asked and supported by affidavits setting forth a concise statement of facts or errors upon which the motion is based.
- (2) Transfer to Court of Appeals: The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief, or (ii) resolution of the motion will require a factual hearing.
- (3) Order to Show Cause: If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

CrR 7.8(c).

The rule requires a trial court to transfer a CrR 7.8 motion to the Court of Appeals when (1) the motion is time barred by RCW 10.73.090, and (2) the defendant has not made a substantial showing he is entitled to relief, or (3) no factual hearing is needed

to resolve the issue. CrR 7.8(c)(2). If the trial court retains the motion, it must order the show cause hearing and direct the parties to appear. CrR 7.8(c)(3).

Here, the trial court retained the motion. It ruled Mr. Capps's motion was timely, but that he failed to make a substantial showing he was entitled to relief. CP 34,36. The court relied on a preamendment CrR 7.8 decision articulated in *State v. Robinson*, which authorized the trial court to:

[S]erve as an initial screener, much like the Chief Judge of the Court of Appeals would in a PRP, prior to either transferring the motion to the Court of Appeals or evaluating the merits of a motion and possibly appointing counsel.

*Robinson*, 153 Wn.2d at 696. The court took no additional action as required under CrR 7.8(c)(2) and (3). CP 34. It did not transfer the motion to the Court of Appeals, nor set the motion for a CrR 7.8(c)(3) show cause hearing.

A trial court abuses its discretion if its decision is manifestly unreasonable. "A decision is manifestly unreasonable if, based on the facts and applicable legal standard, the decision is outside the range of acceptable choices." *Young v. Thomas*, 193 Wn. App. 427, 441, 378 P.3d 183 (2016). Where the trial court fails to follow the mandatory procedures of CrR 7.8(c), it abuses its discretion.

The remedy is to remand to the trial court to follow the proper procedures of CrR 7.8(c). *State v. Flaherty*, 177 Wn.2d 90, 92-93, 296 P.3d 904 (2013); *State v. Smith*, 144 Wn.App. at 864.

2. The Motion Is Timely Because There Has Been A Significant Change In The Law Since 1995.

RCW 10.73.100 provides that the one-year time limit for a collateral attack on a judgment and sentence in a criminal case after the judgment becomes final does not apply to a petition or motion if

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

Shortly after Mr. Capps filed his CrR 7.8 motion the Supreme Court accepted review of *In re Personal Restraint of Light-Roth*, 189 Wn.2d 1030, 408 P.3d 1094 (2017). In *Light-Roth*, the Court held that a significant change in the law is likely to have occurred, for purposes of determining if a personal restraint petition comes with the exception to the one-year limitation, if the defendant could

not argue this issue before an intervening decision. *In Matter of the Personal Restraint Petition of Light-Roth*, 191 Wn.2d 328,334, 422 P.3d 444 (2018).

In *Light-Roth*, the Court held that *O'Dell*, which addressed whether youthfulness may be considered to support a departure from the standard range, was not a significant change in the law because *at the time of sentencing*, case law did not preclude a defendant from arguing youth as a mitigating factor, so long as the youthfulness related to the commission of the crime. *Light-Roth*, 191 Wn.2d at 336. The Court noted, “Whether there has been a ‘significant change in the law’ primarily rests on whether the defendant ‘could have argued this issue before publication of the decision.’” *Light-Roth*, 191 Wn.2d at 337.

In 1995 Mr. Capps was sentenced to life in prison without the possibility of parole. He was 20 years old. It was not for another ten years, with the decision in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), that the Supreme Court recognized that juveniles differ from adults in their psychological and neurological development<sup>1</sup>. *Id.* 559-60.

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<sup>1</sup> In *Roper*, the Court barred the death penalty for children under the age of 18 at the time of the crime. 543 U.S. at 568.

*Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) followed *Roper*, and affirmed the differences between adults and juveniles for purposes of sentencing. *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2458, 183 L.Ed.2d 407 (2012). “The ‘lack of maturity’ and ‘underdeveloped sense of responsibility’ lead to recklessness, impulsivity, and heedless risk-taking...They ‘are more vulnerable...to negative influences and outside pressures,’ including from family and peers; they have limited ‘control over their own environment’...And because a child’s character is not as ‘well-formed’ as an adult’s, his traits are ‘less fixed’ and his actions are less likely to be ‘evidence of irretrievable depravity.’” *Miller*, 132 S.Ct. at 2458.

It was not until 2012, in *Miller*, the Court addressed whether children who commit murder can be sentenced to mandatory life without parole. *Id.* at 2464. The Court found life without parole sentences for children were equal to death sentences; and because of the greater rehabilitative capacity, the particular qualities of youth, and the harshness of life without parole sentences, children should not be sentenced like adults. *Miller*, 132 S.Ct. at 2469. The Court prohibited a life without the possibility of parole sentence absent an individualized sentencing hearing. *Id.* at 2468-69.

In *O'Dell*, our Supreme Court found two things relating to youth and sentencing: First, the “legislature has determined that all defendants 18 and over are, *in general*, equally culpable for equivalent crimes. But it could not have considered the particular vulnerabilities- for example, impulsivity, poor judgment, and susceptibility too outside influences- of specific individuals. The trial court is in the best position to consider those factors.” *State v. O'Dell*, 183 Wn.2d 680, 691, 358 P.3d 359 (2015)..

Second, when the legislature defined an ‘offender’ as a person who has “committed a felony established by state law and is eighteen years of older’...it did not have the benefit of psychological and neurological studies showing that the ‘parts of the brain involved in behavior control’ continue to develop well into a person’s 20s.” *O'Dell*, 183 Wn.2d at 692.

Our Court has acknowledged that the advances in scientific knowledge instructs that “age may well mitigate a defendant’s culpability, even if that defendant is over the age of 18.” *O'Dell*, 183 Wn.2d at 695. While youth is not a per se mitigating factor, entitling a youthful defendant to an exceptional sentence, in light of knowledge about adolescent cognition, “it is far more likely to diminish a defendant’s culpability than this Court implied in

*Ha'mim*...and can therefore amount to a substantial and compelling factor, in particular cases justifying a sentence below the standard range.<sup>2</sup> *Id.* 183 Wn.2d at 696.

When Mr. Capps was sentenced in 1995, the courts did not have the benefit of the neurological and psychosocial research that proves the adolescent brain is physiologically immature compared to an adult brain. The Court rulings are a significant change in the law, making his collateral attack timely. RCW 10.73.100(6).

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Capps respectfully asks this Court to remand the matter to the superior court with instructions to comply with CrR 7.8(c) and hold a show cause hearing at which Mr. Capps may present evidence on his youthfulness and its relation to the commission of the crime.

Respectfully submitted this 21<sup>st</sup> day of November 2018.

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<sup>2</sup> *State v. Ha'mim*, 132 Wn.2d 834, 940 P.2d 633(1997).

## CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on November 21, 2018 I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Pierce County Prosecuting Attorney at [pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us) and to Randy Capps/DOC#704874, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

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